SUPREME COURT, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FRANK HUGHES,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the admission of improper hearsay violated Defendant's rights as guaranteed by the Confrontation Clause of the Sixth Amendment?

Whether the United States of America violated the Jencks Act by failing to produce reports and statements?

Whether the United States of America made improper comments relative to Defendant's failure to testify?

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PETITION FOR WRIT OF CERTIORARI

Frank Hughes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment and order of the United States Court of Appeals for the Fifth Circuit are not officially reported. App. 1a, App.14a. The judgments and order of the United States District Court for the Western District of Louisiana, Shreveport Division, App. 2a-9a, 10a-11a, and 12a-13a are not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit affirming without opinion was entered on November 10, 1997. App. 1a. The order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing was entered on December 17, 1997. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution. The relevant portion of the Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. Amend. V. The relevant portion of the Sixth Amendment states as follows: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI.

The statutory provision involved is the Jencks Act, 18 U.S.C. § 3500. The relevant portion of the Jencks Acts states as follows:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness testified.

18 U.S.C. § 3500.

STATEMENT OF THE CASE

Petitioner, Frank Hughes (hereinafter referred to as "Defendant"), was charged as being a member of a conspiracy to distribute cocaine stemming from an investigation conducted by the Caddo-Bossier Louisiana Narcotics Task Force which had taken place over a four year period (R. Vol. 8, p. 390). The investigation involved the interception of packages mailed to and from members of the alleged conspiracy, controlled buys of cocaine by members of the task force from alleged conspiracy members, tape recordings of members of the task force during the course of the undercover

controlled buys, tape recordings of phone conversations of members of the alleged conspiracy discussing matters concerning the distribution of cocaine, the submission of seized items for fingerprint examination, and the submission of handwriting exemplars for forensic examination. (R. Vol. 8, pp. 388-390 and R. Vol. 2, p. 379). Of all the hundreds of items seized, confiscated, and obtained by the Caddo-Bossier Narcotics Task Force in conjunction with law enforcement officials from Mississippi and California, not one item of physical evidence was seized from Defendant or anyone in his presence. (R. Vol. 5, p. 22 and R. Vol. 8, pp. 387-388). Furthermore, Defendant's handwriting and fingerprints were not recovered from any of the items seized. (R. Vol. 8 pp. 387-389). The Caddo-Bossier Narcotics Task Force made 123 tapes (R. Vol. 2, p. 325) of which Defendant did not appear on any of the tape recordings. (R. Vol. 2, p. 325).

On September 7, 1995, Defendant, along with nine co-defendants, was indicted in a twenty-five count indictment. Defendant was charged in Counts 1 and 25 of the indictment. Count 1 charged Defendant with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Count 25 of the indictment sought seizure of property alleged to be derived from proceeds of the conspiracy pursuant to 21 U.S.C. § 853(p).

On February 6, 1996, the first indictment was dismissed by the entry of a superseding indictment. The superseding indictment was a fourteen count indictment of which Defendant was named in Counts 1, 4, 8 and 14. As to Defendant, Counts 1 and 14 were identical to Counts 1 and 25 in the first indictment. Counts 4 and 8 of the superseding indictment charged Defendant with two counts of Interstate Travel in Aid of Racketeering Enterprises in violation of 18 U.S.C. § 1952. (R. Vol. 4, p. 1013).

An arrest warrant for Defendant was issued by the United States District Court for the Western District of Louisiana, Shreveport Division. When the arrest warrant was executed, a team of local law enforcement officials went to Defendant's residence to execute a search warrant, which had been obtained from a state court in Mississippi. (R. Vol. 5, p. 12 and R. Vol. 11, p. 103). No drugs, drug paraphernalia, large sums of money, or any physical evidence which could be associated with the possession or distribution of a controlled substance were obtained as a result of the execution of the search warrant. (R. Vol. 11, p. 103).

Trial in this matter began on August 6, 1996, and was held in the United States District Court of the Western District of Louisiana, Shreveport Division, with jurisdiction based upon 18 U.S.C. § 3231. All other alleged co-conspirators pled guilty, and Defendant was the only person charged in the indictment to go to trial. Defendant was found guilty of four substantive counts. (R. Vol. 4, p.1026).

The majority of the United States' proof of Defendant's involvement in the alleged conspiracy to distribute cocaine was through co-conspirators or convicted felons; all of whom admitted that they sought to gain the favor of the United States in hopes that the United States would request the appropriate court to give them a lesser sentence. Although law enforcement officers, postal inspectors, and witnesses who were not co-conspirators testified, their testimony was directed solely at proof of the existence of the conspiracy, accomplished through testimony relative to wrongful acts of the co-conspirators. The United States did produce one witness, Stan Crossley, who was uncharged and who testified that Defendant picked up packages mailed to his address.

The only physical evidence introduced against Defendant was circumstantial. This evidence consisted of telephone records reflecting calls made from an apartment allegedly occupied by Garland Rogers, a co-conspirator, to Defendant's shop. (R. Vol. 11, pp. 1021-1027). Garland Rogers testified that Calvin Predom, an indicted co-conspirator, made at least one call to Frank Hughes from this apartment. Defendant introduced certified documents demonstrating that Calvin Predom had in fact left a car at his shop to be repaired and that Calvin Predom had never paid for the repairs to the automobile. These records reflect that Defendant executed a mechanic's lien and took the car as payment. (Defendant's Exhibit 8). These records also reflect that Defendant was seizing the car at or around the same time period as the call from the apartment of Garland Rogers by Calvin Predom. Defendant attempted to call Dennis Ashley, Defendant's business partner, to testify concerning the seizure of the car which had been abandoned for in excess of one year; however, the district court excluded this testimony as irrelevant. (R. Vol. 11, pp. 996-997).

Alleging that the district court erred, Defendant timely filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Jurisdiction was based upon 28 U.S.C. § 1291. The Fifth Circuit on November 10, 1997, affirmed without opinion. On December 17, 1997, the Fifth Circuit denied Defendant's petition for rehearing.

REASON FOR GRANTING THE PETITION

A. THE FIFTH CIRCUIT SANCTIONED A DEPARTURE SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

1. The Admission of Improper Hearsay Testimony Violated Defendant's Rights as Guaranteed by the Confrontation Clause of the Sixth Amendment.

In their case-in-chief the United States called as its witness Officer William Golden, the Director of the Shreveport-Bossier Drug Task Force, to testify to matters constituting hearsay received from a confidential informant. Prior to Officer Golden's testimony the United States produced documents as Jencks material which contained information reported to Officer Golden from an unidentified, confidential informant.[1] The relevant part stated as follows:

> On Saturday, November 27, 1993, GARLAND ROGERS, a.k.a. ROVER traveled to McComb, Pike County, Miss. ROGERS drove his black/yellow Cadillac. . .
>
> ROGERS entered one of HUGHES garages, opened the hood of ROGERS Cadillac, where HUGHES and ROGERS, and CALVIN used a screwdriver and removed approximately 42 (forty two) ounces of crack Cocaine from the engine compartment...
>
> ROGERS and CALVIN are to return to pick up the money for the 42 ounces from HUGHES. ROGERS is alleged to attempt to have his wife accompany him on the trip. . . .

Court's Exhibit No. 1. Upon reading this material, counsel for Defendant immediately objected to Officer Golden testifying to any of the matters related to him by the confidential informant. (R. Vol. 8, pp. 376-377). However, the district court allowed Officer Golden to testify.

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[1] The Jencks material itself was not introduced into evidence but was made a part of the record as Court's Exhibit Number 1.

After eliciting from Officer Golden that he had conducted an investigation into the conspiracy (R. Vol. 8, p. 381), that he developed cases against Garland Rogers and Calvin Predom, a.k.a. Calvin Austin, as members of the conspiracy (R. Vol. 8, pp. 381-382), that he had made "undercover" buys from Garland Rogers (R. Vol. 8, p. 382), and that they had made "undercover" buys from other persons working for Garland Rogers and Calvin Predom (R. Vol. 8, p. 382), the United States then elicited testimony from Officer Golden that he became aware of Defendant in connection with this conspiracy in "later 1993 or early 1994." (R. Vol. 8, p. 384). On direct examination by the United States, Officer Golden testified as follows:

> By Ms. CASSIDY:
> Q. Without telling us what anyone else may have said, what did you tell Steve Rushing or Ron Frazier to be on the lookout for in December of "93?
> A. I told them that I had received information --
> Q. Now, without telling us what information, what did you tell them to look for.
> A. Told them to look for three persons or two persons traveling from Shreveport, to Louisiana to McComb, Mississippi to get money from Frank Hughes.
>
> Mr. Sweet: Objection, Your Honor.
> The Court: On What Basis?
> Mr. Sweet: To the extent it requests hearsay.
> The Court: No. Overruled.
> By Ms. CASSIDY:
>
> Q. Did you describe a particular vehicle?
> A. Yes, we did. I mean, I did, yes.
> Q. What vehicle did you tell them to look for?
> A. It was an older model yellow or gold Cadillac.
> Q. Did you tell them who you thought might been in the Vehicle?
> A. Yes, I did.
> Q. And who did you tell them might be in the vehicle?
> A. That Garland Rogers and possibly Calvin Austin would be in the vehicle, and may be accompanied by one or two females.

(R. Vol. 8, pp. 384-385). This testimony by Officer Golden consisted of the information that the confidential informant had related to Officer Golden without giving Defendant an opportunity to confront the

confidential informant. The United States did not call Officers Steve Rushing or Ron Frazier who they stated this information was related to show that they acted on this information. The only purpose of this testimony was to put before the jury an out of court assertion that Defendant was guilty of involvement in this conspiracy. The admission of this testimony was improper and was a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This Court has promulgated a two-prong test under which the Confrontation Clause would restrict admissible hearsay: (1) the party seeking to introduce the hearsay must demonstrate the declarant's unavailability; and (2) the hearsay statement must bear an "adequate indicia of reliability"[2] to be admissible under the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *see, e.g., Mechlar v. Procunier*, 754 F.2d 1294, 1297 (5th Cir. 1985) (stating test). If the hearsay is admitted pursuant to a "firmly rooted exception to the hearsay rule," then reliability may be inferred. *Roberts*, 448 U.S. at 66. However, it is commonly noted that "[e]vidence that does not fall within a 'firmly rooted hearsay exception' is presumptively unreliable and inadmissible for confrontation clause purposes unless 'it is supported by a 'showing of particularized guarantees of trustworthiness.'" *United States v. Vernor*, 902 F.2d 1182, 1186 (5th Cir. 1990) *citing Lee v. Illinois*, 476 U.S. 530, 543 (1986) (citations omitted). In determining if a hearsay statement has a showing of "particularized guarantees of trustworthiness," courts must look to the "totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

Similar facts to those of the instant case were present in the case of *Favre v. Henderson*, 464 F.2d 359, 361 (5th Cir. 1972), when a police officer testified that the source of his information was confidential informants. In *Favre*, the Fifth Circuit Court of Appeals

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[2] The "indicia of reliability" cannot be the result of "corroboration with other evidence at trial, . . . 'to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.'" *Sherman v. Scott*, 62 F.3d 136, 140 n.2 quoting *Idaho v. Wright*, 497 U.S. 805, 822 (1990).

found that the testimony violated Favre's right to be confror d and stated as follows:

> In short, the jury was led to infer that the informers, who were not identified, were not present in court, and were not subject to cross-examination, believed that Favre was guilty of the crime charged. Inherent in the testimony, which may have been offered only to establish identification, was an assertion by an out-of-court declarant as to guilt. By saying, "Favre committed the crime", the out-of-court declarant said (1) "Favre committed the crime" [identification] and, (2) "Favre committed the crime" [guilt]. . . . The statements were offered to establish the truth of the matters asserted therein - identification, guilt, or both. The truth of the assertions depended upon the credibility of the informers who were not identified, not present in Court, and not subject to cross-examination.

Favre, 464 F.2d at 362. This long-standing problem is inherent when the United States seeks to use an informant's testimony without disclosing his identity. *See, e.g., United States v. Beck*, 138 F.Supp. 756, 758 (S.D. Texas 1956) (cautioning courts to be cautious that "no injustice results from the 'informer' system"). However, the solution is simple:

> [T]he state may not both introduce an unidentified informant's statement at a trial on the merits and at the same time maintain his anonymity. If the state does not wish to disclose the identity of the informant and produce him, it must forego his testimony, else the accused is denied 'the right of confrontation * * * an essential and fundamental requirement for the kind of fair trial which is the country's constitutional goal.'

Favre, 464 F.2d at 367 (citations omitted). It is well established that the Confrontation Clause's mission is to "advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'" *Id.* at 364, quoting *California v. Green*, 399 U.S. at 161; *Dutton v. Evans*, 400 U.S. at 89. *See also Ecker v. Scott*, 69 F.3d 69, 71 (5th Cir. 1995) (stating "the right of confrontation and cross-examination is an essential and fundamental requirement"); *cf. United States v. Cain*, 587 F.2d 678, 682 (5th Cir.

1979) (reversing where officer testified to information received from unidentified individual on the basis of improper hearsay); *United States v. Moody*, 903 F.2d 321 (5th Cir. 1990) (holding the admission of out of court hearsay testimony, without giving the defense an opportunity to offer evidence impeaching the declarant, violated the Confrontation Clause).

In the instant case as in *Favre*, the jury "had absolutely no 'satisfactory basis for evaluating the truth of the prior statement.'" *Favre*, 464 F.2d at 364. The Confrontation Clause issue is emphasized in this action due to the fact that the hearsay declarant was not identified - Defendant had no opportunity to impeach via character evidence, as the unidentified, confidential informant was unknown. Furthermore, the "primary object of the sixth amendment was to prevent the use of ex parte statements against an accused who has no opportunity to confront and cross-examine the witness." *Mechler v. Procunier*, 754 F.2d 1294, 1296 (5th Cir. 1985); *cf. California v. Greene*, 399 U.S. 149, 157-58 (1970). Defendant respectfully submits that where, as in the case *sub judice*, the United States' case lacks physical or forensic evidence the introduction of an out of court assertion of guilt is even more prejudicial.

2. The United States Violated the Jencks Act by Failing to Produce Reports and Statements.

Officer William Golden further testified that he began an investigation into this conspiracy that spanned a period of four years (R. Vol. 8, pp. 379-390), that covered Louisiana, Mississippi, and Los Angeles, California, and involved agents from Georgia and Texas. (R. Vol. 8, p. 381). Officer Golden testified that he targeted Garland Rogers as a member of the conspiracy and made undercover purchases from members of the conspiracy. (R. Vol. 8, p. 381). Officer Golden also named each of the members of the conspiracy from whom he made undercover purchases. (R. Vol. 8, pp. 381-383). Officer Golden then testified that he became aware of Defendant in 1993 and testified about information he received from an informant and related to Mississippi authorities. (R. Vol. 8, pp. 383-386). He also testified that he went to Los Angeles, California to interview Kiki Alverez, a co-conspirator. (R. Vol. 8, p. 386).

Just prior to Officer Golden testifying, Defense counsel was given a nine page document which was represented to be the Jencks material as to this witness. *See* Court's Exhibit Number 1. The Jencks material given to Defense counsel did not cover any of the undercover introductions into the conspiracy Officer Golden testified

about, any of the undercover purchases he testified about, or anything relating to the interview he conducted of Kiki Alverez in Los Angeles, California. Defense counsel doubting that this could be all the Jencks on this witness, the task force director who had conducted a four year investigation into a conspiracy covering Mississippi, Louisiana and California, thoroughly questioned Officer Golden concerning potential Jencks as follows:

> Q. Have you reviewed other documents in connection with your investigation?
> A. Yes, I have.
> Q. What documents have you reviewed?
> A. Concerning What, Sir?
> Q. The investigation that you're here talking about, testifying about, testifying about.
> A. The investigation that we have is -- has been going on for four years, and there are volumes of reports.
> Q. Have you read through those reports?
> A. I had in the past, yes, sir, not in the last couple of days, no. I didn't have time.
> Q. Were they reports about what your investigation -- you personally were involved in?
> A. Yes, sir.
> Q. And were you reading them to determine, make sure that they were accurate and complete?
> A. As far as I remember, yes.
> Q. And the reports that you reviewed were accurate and complete: is that right?
> A. Yes, Sir. As far as my memory is, yes, sir.
> Q. And you adopted them as your statement? Like if a report talked about an undercover buy that you were involved in and you reviewed it for accuracy, then if it was correct -- if it was incorrect, you could change it?
> A. Yes.
> Q. If it was correct, you could adopt it as your statement, also, as to what occurred?
> A. Yes, sir, as to a report of what I saw or what I heard or what I did.
> Q. How many such reports would you say you reviewed like that?
> A. Hundreds.
> Q. And on each of the occasions where you were involved, would you review the reports?

A. Yes.
Q. And you were involved with the entire investigation over the four years that occurred here in Shreveport?
A. Yes, Sir. I was involved in most of it, yes, sir. Either that or personnel of our task force or D.E.A. or whatever organization.
Q. If personnel of your task force was involved, would you also review that statement --
A. Yes, sir.
Q. -- For its' accuracy?
A. Yes, sir.

(R. Vol. 8, pp. 390-392).

Pursuant to this testimony, Defense counsel then requested the district court to either order the production of the documents or conduct an *in camera* inspection of the documents. The district court responded "[w]hy? Why would I want to read thousand of pages of documents? He's given you what he read in preparation for his testimony today. Tell me why it is necessary for me to read of all the activities of this task force over the last how many years?" (R. Vol. 8, p. 393). The district court then stated that it was accepting the United States' assurances that all of the Jencks material had been given to the Defendant. (R. Vol. 8, p. 396). Defense counsel then cited the court to *United States v. McKenzie*, 768 F. 2d 602 (5th Cir. 1985). After the district court read *McKenzie* the court stated to the United States' attorney as follows:

> I mean, I'll be glad if you can tell me that this is bad law, because I sure am not anxious to do it, but that's the way I read *United States versus McKenzie* as saying.

The district court then went on to say:

> I don't know how I could refuse it. You want time to look at this case and find -- if you can find me a squeeze hole that I can get out of reading all this, believe me -- I'm in the middle of an excellent novel. I'd much rather spend my evenings reading it than all this. You want time to look up *United States v. McKenzie*, 768, and shepard it?

(R. Vol. 8, p. 398). The district court did not rule at that time. Later in the trial, the district court refused to require the United States to produce any documents, refused to do an *in camera* inspection of the documents and refused to seal the documents and make them a part of the record to be reviewed on appeal. (R. Vol. 8, pp. 460-461).

Clearly, the United States did not produce all the Jencks material as to Officer Golden. The Defendant has no way to know all of the statements which were not produced. However, later in the trial when Kiki Alverez testified, the issue of the United States failing to timely produce recordings of an interview of Kiki Alverez was again raised. At that time, it was revealed that a partial tape of Officer Golden's interview of Kiki Alverez had been made, a transcript of that tape had been made, and a report of the interview had been made. (R. Vol. 10, pp. 726-727). This Jencks material was not produced for cross-examination of Officer Golden in spite of the fact that Officer Golden testified concerning the interview on direct-examination for the United States. Defendant submits that this is conclusive proof that the United States was wrong in the assurances given to the district court.

The failure of the district court to order that the reports and statements be produced to Defendant by the United States or conduct an *in camera* evaluation of the reports was error, a violation of the Jencks Act, 18 U.S.C. § 3500, mandating a reversal of the judgment of conviction, and a new trial. *United States v. Pierce*, 893 F.2d 669 (5th Cir. 1990); *United States v. McKenzie*, 768 F.2d 602 (5th Cir. 1985); *United States v. Hogan*, 763 F.2d 697 (5th Cir. 1985); *United States v. Conroy*, 589 F.2d 1258 (5th Cir. 1979); *United States v. Ogbuehi*, 18 F. 3d 807 (9th Cir. 1994). Prior to the case *sub judice*, the Fifth Circuit had mandated as follows:

> The district court has a duty to inspect documents *in camera* if a timely request is made by the defense and some indication exists in the record that the notes meet the Jenck's Act's definition of a statement. *United States v. Hogan*, 763 F.2d at 704; *United States v. Edwards*, 702 F.2d 529, 531 (5th Cir. 1983).

United States v. Pierce, 893 F.2d 669, 675 (5th Cir. 1990). The district court in the instant case failed to met this duty. Moreover, the district court may not rely on "...United States assertions alone to resolve disputes about the adequacy of disclosure under the act." *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985). Reliance on the United States' assertions is particularly misplaced in the face of concrete evidence, i.e., the testimony of the officer

himself, that the statements exist and relate to the drug conspiracy. The officer's testimony directly contradicted the specific representation made by the United States and relied upon by the district court in denying Defendant's motion for production of the materials or an *in camera* review.

The Defendant was "entitled to relevant and competent reports and statements in the possession of the Government touching the events and activities as to which a Government witness has testified at trial." *Goldberg v. United States*, 425 U.S. 94, 104 (1976). The denial of the motion amounted to a violation of the Jencks Act, mandating production of the documents or an *in camera* review, and a new trial.

3. The Prosecutor Made Improper Comments Relative to Defendant's Failure to Testify.

The United States put into evidence three phone calls made to the business residence of Defendant from an apartment said to be occupied by Garland Rogers and Calvin Predom. (R. Vol. 11, pp. 1021-1027). In closing arguments, the United States argued that these calls were for the purpose of a drug deal as opposed to a legitimate purpose. Specifically, the United States argued that "[t]here's no explanation but for Frank Hughes was calling Calvin Predom to get cocaine." Counsel for Defendant objected. (R. Vol. 12, pp. 1139-1140).

The United States was correct that Defendant had not testified to offer an explanation. However, Defendant submits that this comment was an improper comment on his failure to place testimony before the jury countering certain evidence argued to be material by the United States. *U.S. Const. Amend. 5*; *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Pennington*, 20 F.3d 593 (5th Cir. 1994); *United States v. Laury*, 985 F.2d 1293 (5th Cir. 1993).

Simply, the United States "may not comment directly or indirectly on a defendant's failure to testify." *United States v. Fierro*, 38 F.3d 761, 771 (5th Cir. 1994); *see United States v. Garcia*, 655 F.2d 59, 64 (5th Cir. 1981) (stating "both direct and indirect comments which undermine the defendant's fifth amendment rights will invalidate a conviction"). Such comments upon defendant's failure to testify "violate the defendant's fifth amendment rights and necessitate reversal." *United States v. Fogg*, 652 F.2d 551, 557 (5th Cir. 1981). Prior to the case *sub judice*, the Fifth Circuit Court of

Appeals warned prosecutors that commenting upon silence of a defendant "is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete." *United States v. Edwards*, 576 F.2d 1152, 1155 (5th Cir. 1978). The Fifth Circuit even went as far to "suggest that [such comments] be abandoned as a prosecutorial technique." *Edwards*, 576 F.2d at 1155.

The case of *United States v. Wilkerson*, 534 F.2d 43 (5th Cir. 1976), presented the Fifth Circuit Court of Appeals with a similar factual scenario. In *Wilkerson*, the prosecutor in closing argument stated, "[t]he only two people that can bring out that testimony are the people that were there, and we have brought you the testimony of Mr. Harris." *Wilkerson*, 534 F.2d at 44. The *Wilkerson* court held that even though no objection was made, "this was a comment on the failure of the defendant to take the witness stand and it was plain error." *Id.* (citation omitted). *See also United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978) (reversing due to the prosecutor's closing comment that "there was no reasonable explanation given").

This error alone warrants a new trial, as a defendant may be entitled to such "when the prosecutor's remarks during closing argument are both inappropriate and harmful." *United States v. Tomblin*, 46 F.3d 1369, 1389 (5th Cir. 1995). In order to prevent reversal when a Fifth Amendment violation has occurred due to a comment upon the defendant's failure to testify, the United States could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993). Due to the weakness of evidence against Defendant, it is impossible to view the United States' comments as harmless. Such comments were substantially prejudicial to Defendant and warrant reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS C. SWEET III*
DEANNE M. MOSLEY
LANGSTON FRAZER SWEET
& FREESE, P.A.
201 NORTH PRESIDENT STREET
JACKSON, MS 39201
(601)969-1356

Attorneys for Petitioner
Frank Hughes

**Counsel of Record*

Dated: February 6, 1998.

APPENDIX

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 96-31223

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK HUGHES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

(95-CR-50071)

Before EMILIO M. GARZA, STEWART, AND DENNIS, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5TH CIR. R. 47.6.

[Date of Entry November 10, 1997]

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

AO 245B (3/95) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After Nov. 1, 1987)

V.

CASE NUMBER: 5:95CR50071-10

FRANK HUGHES Dennis C. Sweet, III
Defendant's Attorney

THE DEFENDANT:

_____pleaded guilty to count (s)_____
_____pleaded nolo contendere to count (s) _____
which was accepted by the court.
__x__was found guilty on count (s) One, Four, Seven and Eight
after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841(a)(1) & 846	Conspiracy to Distribute Cocaine, and in Excess of 50 Grams of Cocaine Base	03/31/95	1
18 USC 1952	Interstate Travel in Aid of Racketeering Enterprises	12/31/92	4
18 USC 1952	Interstate Travel in Aid of Racketeering Enterprises	11/30/93	7
18 USC 1952	Interstate Travel in Aid Racketeering Enterprises	12/06/93	8

The defendant is sentenced as provided in pages 2 through __6__ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_____The defendant has been found guilty on count (s) _____.

_____Count (s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 587-20-3839

November 7, 1996
Date of Imposition of Judgment

Defendant's Date of Birth: 02/10/50

04160-043
Defendant's USM Number

/s/ Donald E. Walter
Signature of Judicial Officer

Defendant's Residence Address:
410 Universal

Hon. Donald E. Walter
United States District Judge

McComb, MS 39648

Defendant's Mailing Address:

November 12, 1996
Date

410 Universal Street

ATTEST A TRUE COPY: ROBERT H. SHEMWELL, CLERK U.S. DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA

McComb, MS 39648

BY: _____
DATE: _____

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 324 MONTHS as to count one. As to counts four, seven and eight, defendant is committed to the custody of the Bureau of Prisons for a term of 60 months, to run concurrent with one another, and concurrent to the term imposed in count one.

_____The court makes the following recommendations to the Bureau of Prisons:

__X__The defendant is remanded to the custody of the United States Marshal.

_____The defendant shall surrender to the United States marshal of this district:

_____at ____ a.m./p.m. on ____.

_____as notified by the United States Marshal.

_____The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_____before 2 p.m. on _____.

_____as notified by the United States Marshal.

_____as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

5 YEARS as to count one. As per counts four, seven and eight, the term of supervised release is three yeas, to run concurrent with the term imposed in count one.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall submit to drug abuse treatment as indicated by the probation office, to include antabuse and drug surveillance, if indicated, and/or inpatient treatment, until such time defendant is released from supervised release.

_____The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

__X__ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation office and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful corporation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) The defendant shall notify the probation officer with seventy-two hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's a criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification required.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Count	Assessment	Fine	Restitution
1, 4, 7, 8	$50.00ea		

_____If Applicable, restitution amount ordered pursuant to plea agreement

Totals:	$200.00	$	$

FINE

The above fine includes any costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine of more than $2,500 unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 USC § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default & delinquency pursuant to 18 USC § 3612 (g).

_____The court has determined that the defendant does not have the ability to pay interest and it is ordered that

The interest requirement is waived.
_____The interest requirement is modified as follows:

RESTITUTION

The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A & 113A of Title 18 for offenses committed on or after 09/13/1994, until ____. An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name & Address Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A 7 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A	X	in full immediately;
B	__	$_____ immediately, balance due (in accordance with C, D, or E); or
C	__	not later than _____; or
D		in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or
E		in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year (s) to commence _____ days after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay the cost of prosecution.

The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if its judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

_____The court adopts the factual findings and guideline application in the presentence report.

OR

_____The court adopts the factual findings and guideline application in the presentence report except

Guideline Range Determined by the Court:

Total Offense Level: 1

Criminal History Category: 41

Imprisonment Range: 324 to 405 months

Supervised Release Range: 5 years

Fine Range: $25,000 to $4,0000,000

__X__Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $____

_____The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

_____The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason (s):

OR

_____The sentence departs from the guideline range

_____Upon motion of the government, as a result of defendants substantial assistance.

_____For the following reason (s):

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*CRIM. NO. 95-50071-10
VERSUS	*
FRANK HUGHES	*JUDGE DONALD E. WALTER

ORDER OF FORFEITURE

WHEREAS, in Count 14 of the Superseding Indictment, the United States sought forfeiture, pursuant to 21 U.S.C. §853 of $1,500,000.00 as property constitution, or derived from proceeds the defendant obtained directly or indirectly, as the result of violations of conspiracy to distribute cocaine and cocaine base, or property used or attempted to be used in any manner or part to commit or facilitate the commission of conspiracy to distribute cocaine and cocaine base;

AND WHEREAS, at the conclusion of the trial in this case, the jury returned a Special Verdict of Forfeiture finding $350,000.00 subject to forfeiture as property involved in the conspiracy to distribute cocaine and cocaine base, or as property traceable to such violations;

THEREFORE, the United States is entitled to an Order of Forfeiture of this amount of money pursuant to 21 U.S.C.§ 853 and Rule 32 (d) (2) of the Federal Rules of Criminal Procedure;

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Based upon the jury verdict of guilty of the defendant as to Count 1, the United States is authorized to seize $350,000.00 belonging to the defendant, Frank Hughes, and it is forfeited to the United States for disposition in accordance with the law, subject to the provisions of 21 U.S.C. §853 (n).

2. That pursuant to 21 U.S.C. §853(n), United States Marshal forthwith shall publish once for three successive weeks in a newspaper of general circulation, notice of this Order, notice of the Marshal's intent to dispose of the property in such manner as the Attorney General may direct; and notice that any person, other than the defendant, Frank Hughes, having or claiming a legal interest in the forfeited property must file a petition with this Court within thirty (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier.

This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the forfeited property, shall be signed by the petitioner under penalty of perjury; and shall set forth the nature and extent of the petitioner's right, title or interest in the forfeited property and any additional facts supporting the petition's claim and the relief sought.

The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the Order of Forfeiture, as a substitute for published notice as to those persons so notified.

That upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. §853(n), in which all interests will be addressed.

THUS ORDERED AND SIGNED this 6 day of November, 1996.

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*
	*
VERSUS	* CRIMINAL NO. 95-50071-10
	* DISTRICT JUDGE WALTER
FRANK HUGHES	*MAGISTRATE JUDGE PAYNE

FINAL JUDGMENT OF FORFEITURE

WHEREAS, on November 7, 1996, this Court entered an Order of Forfeiture pursuant to the provisions of 21 U.S.C. § 853 forfeiting $350,000.00 in proceeds based upon the trial and conviction of Frank Hughes.

AND WHEREAS, on April 23 and 30 and May 7 of 1997, the United States published in The Times, a Shreveport newspaper of general circulation, notice of this forfeiture and of the intent of the United States to forfeit the $350,000.00 and further notifying all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of their alleged legal interest in the property;

AND WHEREAS, it appears from the record that no claims, contested or otherwise, have been filed for any of the properties described in this Court's November 6, 1996 Order of Forfeiture;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That all right, title, and interest to the $350,000.00 in proceeds is hereby condemned, forfeited and vested in the United States of America and shall be seized and disposed of according to the law by the United States Marshal's Service.

The Clerk is hereby directed to send copies of this Order to all counsel of record.

SO ORDERED this 30th day of September, 1997, at Shreveport, Louisiana.

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-31223

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK HUGHES

Defendant - Appellant

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

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ON PETITION FOR REHEARING

Before EMILIO M. GARZA, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

[Date of Entry December 17, 1997]